

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

RICHARD F. LEE and AUNETTA M.
ROACH,

Plaintiffs,

v.

SIERRA PACIFIC MORTGAGE
COMPANY; et al.,

Defendants.

3:09-cv-00590-LRH-RAM

ORDER

Before the court are defendants Sierra Pacific Mortgage Company, Inc. (“Sierra Pacific”) and Greenhead Investment, Inc.’s (“Greenhead”) motion to dismiss (Doc. #81¹) and defendant Greenpoint Mortgage Funding, Inc.’s (“Greenpoint”) motion to dismiss and expunge lis pendens (Doc. #86). Plaintiffs Richard F. Lee and Aunetta M. Roach (collectively “plaintiffs”) filed oppositions to the motions. Doc. ##85, 92.

I. Facts and Background

On December 29, 2006, plaintiffs purchased real property through a mortgage executed by defendant Sierra Pacific. Plaintiffs defaulted on the mortgage and defendants initiated foreclosure proceedings. Subsequently, on September 1, 2009, plaintiffs filed a complaint against defendants

¹ Refers to the court’s docket entry number.

1 for wrongful foreclosure. Doc. #1, Exhibit 1.

2 Meanwhile, in late 2009, the United States Judicial Panel on Multi-District Litigation
3 (“panel”) consolidated a series of cases in which plaintiffs alleged that MERS engaged in improper
4 business practices when processing home loans. The panel assigned Judge James A. Teilborg
5 (“Judge Teilborg”) to oversee these cases and preside over all issues (discovery, dispositive
6 motions, settlement) except for trials. *In re: Mortgage Electronic Registration Systems (MERS)*
7 *Litigation*, MDL No. 2119.

8 In various transfer orders the Panel consolidated several cases, including the current matter
9 *Lee v. Sierra Pacific Mortgage Co.*, 3:09-cv-0590-LRH-RAM, with the multi-district litigation.
10 However, as part of the transfer order, the Panel transferred only those claims that “relate to the
11 formation and/or operation of MERS.” The Panel held that all other claims “unrelated to the
12 formation and/or operation of the MERS system are separately and simultaneously remanded” to
13 the district court in which they were first brought.

14 On April 23, 2010, Judge Teilborg issued an initial remand order. Doc. #50. However, after
15 the initial order on remand, Judge Teilborg granted plaintiffs leave to file an amended complaint.
16 See Doc. #1055, case no. 2:09-md-2119-JAT. On August 16, 2010, plaintiffs filed a first amended
17 complaint in the multi-district litigation against defendants alleging eleven causes of action: (1)
18 injunctive relief; (2) declaratory relief; (3) debt collection violations; (4) violation of Nevada’s
19 Unfair and Deceptive Trade Practices Act, NRS 598.0923; (5) violation of Nevada’s Unfair
20 Lending Practices Act, NRS 598D.100; (6) breach of the covenants of good faith and fair dealing;
21 (7) violation of NRS 107.080; (8) quiet title; (9) fraud in the omission; (10) fraud in the
22 inducement; and (11) unjust enrichment.² Doc. #1073, case no. 2:09-md-2119-JAT.

23 Subsequently, on March 21, 2011, Judge Teilborg issued an amended remand order.

24
25 ² Plaintiffs’ unjust enrichment claim was improperly identified as the fourteenth (14) cause of
26 action in the first amended complaint.

1 Doc. #68. Pursuant to that order Judge Teilborg remanded: (1) claim 3 for debt collection
2 violations; (2) claim 4 for violation of Nevada's Unfair and Deceptive Trade Practices Act,
3 NRS 598.0923; (3) claim 5 for violation of Nevada's Unfair Lending Practices Act,
4 NRS 598D.100; (4) claim 6 for breach of the covenants of good faith and fair dealing; (5) claim 7
5 for violation of NRS 107.080; (6) claim 11 for unjust enrichment; (7) claim 1 for injunctive relief
6 as it relates to the remanded claims; and (8) claim 2 for declaratory relief as it relates to the
7 remanded claims. *Id.* Thereafter, moving defendants filed the present motions to dismiss.
8 Doc. ##81, 86.

9 **II. Legal Standard**

10 Moving defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for
11 failure to state a claim upon which relief can be granted. To survive a motion to dismiss for failure
12 to state a claim, a complaint must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice
13 pleading standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir.
14 2008). That is, a complaint must contain "a short and plain statement of the claim showing that the
15 pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Rule 8(a)(2) pleading standard does not
16 require detailed factual allegations; however, a pleading that offers "'labels and conclusions' or 'a
17 formulaic recitation of the elements of a cause of action'" will not suffice. *Ashcroft v. Iqbal*, 129 S.
18 Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

19 Furthermore, Rule 8(a)(2) requires a complaint to "contain sufficient factual matter,
20 accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 1949 (quoting
21 *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows
22 the court to draw the reasonable inference, based on the court's judicial experience and common
23 sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. "The plausibility
24 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a
25 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a
26

1 defendant's liability, it stops short of the line between possibility and plausibility of entitlement to
2 relief." *Id.* at 1949 (internal quotation marks and citation omitted).

3 In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as
4 true. *Id.* However, "bare assertions . . . amount[ing] to nothing more than a formulaic recitation of
5 the elements of a . . . claim . . . are not entitled to an assumption of truth." *Moss v. U.S. Secret*
6 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951) (brackets in original)
7 (internal quotation marks omitted). The court discounts these allegations because "they do nothing
8 more than state a legal conclusion—even if that conclusion is cast in the form of a factual
9 allegation." *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) "In sum, for a complaint to survive a motion to
10 dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be
11 plausibly suggestive of a claim entitling the plaintiff to relief." *Id.*

12 **III. Discussion**

13 **A. Debt Collection Violations**

14 Pursuant to NRS § 649, it is a violation of state law to violate any provision of the federal
15 Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 et seq. NRS § 649.370. Here,
16 plaintiffs allege that defendants violated the FDCPA by initiating a non-judicial foreclosure without
17 following the proper procedures for attempting to collect a debt.

18 It is well established that non-judicial foreclosures are not an attempt to collect a debt under
19 the Fair Debt Collection Practice Act and similar state statutes. *See e.g., Hulse v. Ocwen Fed. Bank*
20 *FSB*, 195 F. Supp. 2d 1188 (D. Or. 2002); *Charov v. Perry*, 2010 U.S. Dist. LEXIS 65798 (D. Nev.
21 2010) (holding that recording a notice of default is not an attempt to collect a debt because the
22 borrower already consented to allow the foreclosure trustee to record the notice upon default).
23 Therefore, the court finds that plaintiffs fail to state a claim against moving defendants for violation
24 of the FDCPA, and thereby NRS § 649.

25 ///

1 **D. Breach of Good Faith and Fair Dealing**

2 Under Nevada law, “[e]very contract imposes upon each party a duty of good faith
3 and fair dealing in its performance and execution.” *A.C. Shaw Constr. v. Washoe County*, 784
4 P.2d 9, 9 (Nev. 1989) (quoting Restatement (Second) of Contracts § 205). To establish a claim for
5 breach of the implied covenant of good faith and fair dealing, a plaintiff must show that: (1) the
6 plaintiff and defendant were parties to a contract; (2) the defendant owed a duty of good faith and
7 fair dealing to the plaintiff; (3) the defendant breached his duty by performing in a manner
8 unfaithful to the purpose of the contract; and (4) the plaintiff’s justified expectations were denied.
9 *See Perry v. Jordan*, 134 P.3d 698, 702 (Nev. 2006) (citing *Hilton Hotels Corp. v. Butch Lewis*
10 *Prod. Inc.*, 808 P.2d 919, 922-23 (Nev. 1991).

11 Here, there is no contract between plaintiffs and defendants Greenhead and Greenpoint. The
12 only contract is the mortgage contract between plaintiffs and defendant Sierra Pacific. Thus,
13 plaintiffs fail to state a claim against these defendants for breach of the covenants of good faith and
14 fair dealing.

15 As to defendant Sierra Pacific, plaintiffs allege that Sierra Pacific misrepresented the cost of
16 credit involved in the loan agreement. However, these alleged misrepresentations occurred *before* a
17 contract was formed. Plaintiffs fail to allege any facts to establish a breach of the implied covenants
18 *after* the contract between the parties was formed. Accordingly, plaintiffs fail to state a claim
19 against for breach of the covenants of good faith and fair dealing as to defendant Sierra Pacific.

20 **E. NRS 107.080**

21 In their complaint, plaintiffs allege that defendants improperly foreclosed on their property
22 because the promissory note was severed from the deed of trust and none of the defendants hold the
23 original mortgage note. However, Nevada law does not require the production of the original note
24 before one of the statutorily enumerated parties initiates a non-judicial foreclosure. *Weingarter v.*
25 *Chase Home Finance, LLC*, 702 F. Supp. 2d 1276, 1280 (D. Nev. 2010).

1 **F. Unjust Enrichment**

2 To set forth a claim for unjust enrichment, a plaintiff must allege that a defendant unjustly
 3 retained money or property of another against fundamental principles of equity. *See Asphalt Prods.*
 4 *Corp. v. All Star Ready Mix*, 898 P.2d 699, 700 (Nev. 1995). However, an action for unjust
 5 enrichment cannot stand when there is an express written contract which guides the activities of the
 6 parties. *LeasePartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 942 P.2d 182, 187
 7 (Nev. 1997).

8 Here, there was a written contract between the parties, namely, the deed of trust and
 9 mortgage note. These documents guided the interactions, obligations, and rights of the parties. As
 10 such, plaintiffs cannot make a claim in equity for actions that are guided by a contract to which they
 11 are parties. *See LeasePartners Corp.*, 942 P.2d at 187-88.

12 **G. Declaratory Relief and Permanent Injunction**

13 Plaintiffs' remaining causes of action for injunctive and declaratory relief are remedies that
 14 may be afforded to a party after they have sufficiently established and proven their claims; they are
 15 not separate causes of action. *See e.g., In re Wal-Mart & Hour Employment Practices Litig.*, 490 F.
 16 Supp. 1091, 1130 (D. Nev. 2007) (holding that a claim for injunctive relief was not a separate cause
 17 of action or independent ground for relief). Here, plaintiffs' remanded claims fail to establish a
 18 claim for relief. Accordingly, plaintiffs are not entitled to their requested remedies.

19 **H. Request to Expunge Lis Pendens**

20 In its motion, defendant Greenpoint also requests the court expunge the recorded lis
 21 pendens. *See Doc. #86*. The court has reviewed the documents and pleadings on file in this matter
 22 and finds that it is without jurisdiction to grant the request to expunge lis pendens. Pursuant to 28
 23 U.S.C. § 1407, any action transferred to another court by an order of the Judicial Panel on
 24 Multidistrict Litigation divests the transferor court of jurisdiction over any pretrial motion or
 25 pleading unless the action, or any separate claim or cross-claim, has been remanded to the
 26

1 transferor court. *See* 28 U.S.C. § 1407(a); Rule 1.5 of the Rules of Procedure of the Judicial Panel
2 on Multidistrict Litigation, 199 F.R.D. 425, 426 (2001).

3 Here, Judge Teilborg issued an order of remand in this action only as to certain claims. As
4 such, this court had jurisdiction over this action only as it related to these claims. Greenpoint's
5 request to expunge lis pendens affects the relief available to plaintiffs over claims that were not
6 remanded to this court including their claim for fraud. Therefore, the court finds that it is without
7 jurisdiction to entertain the request to expunge lis pendens and shall deny it accordingly.

8
9 IT IS THEREFORE ORDERED that defendants' motion to dismiss (Doc. #81) is
10 GRANTED. Defendant Sierra Pacific Mortgage Company, Inc. and Greenhead Investment, Inc. are
11 DISMISSED as defendants as to the remanded claims.

12 IT IS FURTHER ORDERED that defendant's motion to dismiss and expunge lis pendens
13 (Doc. #86) is GRANTED in-part and DENIED in-part in accordance with this order. Defendant
14 Greenpoint Mortgage Funding, Inc. is DISMISSED as a defendant as to the remanded claims.

15 IT IS SO ORDERED.

16 DATED this 3rd day of November, 2011.



17
18
19 LARRY R. HICKS
UNITED STATES DISTRICT JUDGE